

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  CONFIDENTIALITY FOR CERTAIN INFORMATION	DOCKET NO. RMU-01-12
--	----------------------

**ORDER COMMENCING RULE MAKING**

(Issued December 11, 2001)

Pursuant to the authority of Iowa Code §§ 22.7(3), 22.7(6), 476.1, 476.2, and 17A.4 (2001), the Utilities Board proposes to adopt the rules attached hereto and incorporated herein by reference in this order. These rules amend 199 IAC 1.9(5). This proceeding has been identified as Docket No. RMU-01-12. The reasons for proposing these amendments are set forth in the attached notice of intended action.

**IT IS THEREFORE ORDERED:**

1. A rule making proceeding identified as Docket No. RMU-01-12 is commenced for the purpose of receiving comments on the proposed rules in the notice attached hereto and incorporated herein by reference in this order.

2. The Executive Secretary is directed to submit for publication in the Iowa Administrative Bulletin a notice in the form attached to and incorporated by reference in this order.

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

Dated at Des Moines, Iowa, this 11<sup>th</sup> day of December, 2001.

## **UTILITIES DIVISION [199]**

### **Notice of Intended Action**

Pursuant to Iowa Code sections 17A.4, 22.7(3), 22.7(6), 476.1 and 476.2, the Utilities Board (Board) gives notice that on December 11, 2001, the Board issued an order in Docket No. RMU-01-12, In re: Confidentiality For Certain Information. The Board is proposing to amend 199 IAC 1.9(5) concerning the granting of confidential treatment for certain specific types of information filed with the Board.

Under current Board rules, a utility must comply with the filing requirements of 199 IAC 1.9(6) to have information filed with the Board withheld from public inspection. If the Board finds after review that the information is confidential pursuant to some provision of Iowa Code § 22.7, or other law, it issues an order granting the request for confidentiality, citing the code section, and stating that the information shall be held confidential by the Board subject to the provisions of 199 IAC 1.9(8)"b"(3). Subparagraph 9(8)"b"(3) provides procedures for handling requests to obtain information earlier found to be confidential by Board order.

Pursuant to the requirements of 199 IAC 1.9(6), requests that some categories of information be withheld from public inspection are filed with the Board routinely in purchased gas adjustment (PGA) and energy adjustment clause (EAC) proceedings and with almost every application for a certificate of public convenience and necessity to provide competitive local exchange service. The Board grants these requests based upon the competitive nature of the utility industry and the sensitive

nature of the information. These requests are granted pursuant to Iowa Code § 22.7(3) as trade secrets or pursuant to Iowa Code § 22.7(6) as reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose.

The information that is routinely provided protection consists of (1) actual negotiated prices of natural gas supply filed monthly and yearly with PGA filings, (2) negotiated prices for purchases of electric power filed monthly and yearly with EAC filings, and (3) financial information filed by applicants for local exchange service certificates of convenience and necessity. Under current procedures, the Board issues over 40 orders a year granting requests for confidentiality associated with PGA filings. The Board issues approximately 40 orders granting confidentiality associated with monthly and yearly EAC filings. Over the past 12 months the Board has issued 24 orders granting requests for confidentiality associated with financial records for applicants for local exchange service certificates.

Iowa courts have interpreted the requirements for protecting certain information under Iowa Code § 22.7(3) and (6). U S WEST Communications, Inc., et. al., v. Office of Consumer Advocate, 498 N.W.2d 711 (Iowa 1993), and State of Iowa ex rel. Thomas J. Miller, Attorney General of Iowa v. Publishers Clearing House, Inc., 633 N.W.2d 732, 739-740 (Iowa 2001). The U S WEST Communications, Inc., case provides an analysis of what is considered a trade secret and the burden a person seeking to protect information claimed to be a trade secret must meet. The court uses the definition in Iowa Code § 550.2(4) to consider whether information is a trade secret that can be kept from public disclosure. The court held that a broad

range of information, data and facts which, if kept secret, provide the holder with an economic advantage over competitors or others, qualify as trade secrets.

U S WEST Communications, Inc., at 714. The court then discussed the two other criteria in Iowa Code § 550.2(4). First that the trade secret derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by a person able to obtain economic value from its disclosure or use. Second, the trade secret is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Specifically, the court held that to have economic value a trade secret must be useful to a competitor and require cost, time, and effort to duplicate. Id.

The court then stated that the term "economic value," used in determining whether information is protected as a trade secret, is also used to determine whether the information is protected under § 22.7(6). U S WEST Communications, Inc., at 715. The court held that the term "economic value" includes the meaning of "economic advantage to a competitor" under paragraph 7(6).

The Publishers Clearing House case also addresses trade secrets and when they are protected from public disclosure. In this recent case, the court stated that it had a strong interest in the free flow of information on the one hand and protection from commercial damage and abuse of discovery on the other and had developed certain rules for the purpose of addressing those issues. Publishers Clearing House, at 739-740. The court stated that it has insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements in order to establish good cause to prevent disclosure. The court then went on to

state that courts are to apply three criteria for evaluating requests for protection:

1) the harm posed by dissemination must be substantial and serious, (2) the order must be narrowly drawn, and (3) there must be no alternative means of protecting the public interest that intrudes less directly on expression. Publishers Clearing House, Inc., at 740.

Based upon the nature of the information protected and the economic value to competitors from the disclosure of the negotiated purchase prices of natural gas and electric power, there appears to be no question that the information comes within the protection of Iowa Code §§ 22.7(3) and (6), and the Board believes would be protected by a court under the above cases. The Board requires that specific information be filed to support the PGA and EAC filings, and the same type of information is filed with each filing. The Board has consistently held that this information is a report to a governmental agency which if released would benefit competitors. Additionally, the release of the information could have a negative effect on the public since the release of the information could impair the ability of the utility to negotiate the best price and this could result in higher prices for gas and electric service. Thus the effect would be a detriment to the public rather than serving a public purpose. Also, using the criteria discussed in the U S WEST Communications, Inc., and Publishers Clearing House, Inc., cases, it is clear that the information satisfies the definition of "trade secret[s]" found in Iowa Code § 550.2(4).

For the financial information of applicants for local exchange service certificates, the same reasoning applies. The information is claimed by the applicant to be particularly sensitive and release would benefit competitors since it would disclose

the financial soundness of the new entrant. The telecommunications industry in the area of local exchange competition is becoming increasingly competitive and entrants into the market allege they would be at a disadvantage if they had to disclose their financial backing and expenditures. The public interest would not be served by release of this information because it would be damaging to the development of competition. This information also satisfies the § 550.2(4) definition of "trade secret[s]."

For requests in these three contexts, the analysis of whether the information should be withheld has been repeated over and over and the Board has consistently granted the protection. This type of rote recitation accomplishes little. The adoption of a rule that grants protection for these routine requests upon identification and segregation of the confidential portions of the filings and an assertion by an attorney for the company or a corporate officer that those portions satisfy the requirements of either Iowa Code §§ 22.7(3), (6), or both, as interpreted by the Iowa Supreme Court, will reduce paperwork and place more focus on those confidentiality requests that are not so routine.

Subrule 199 IAC 1.9(5) sets out categories of records that are not routinely available for public inspection. It is proposed that the three categories described above would be added to those already in the subrule as a new paragraph "c." The records to be held confidential under proposed 199 IAC 1.9(5)"c" will continue to be subject to release pursuant to a public records request, unless the party requesting confidentiality gets a court order authorizing the Board to not release the materials.

Pursuant to Iowa Code sections 17A.4(1)"a" and "b," any interested person may file a written statement of position pertaining to the proposed amendments. The statement must be filed on or before January 29, 2002, by filing an original and ten copies in a form substantially complying with 199 IAC 2.2(2). All written statements should clearly state the author's name and address and should make specific reference to this docket. All communications should be directed to the Executive Secretary, Iowa Utilities Board, 350 Maple Street, Des Moines, Iowa 50319-0069.

No oral presentation is scheduled at this time. Pursuant to Iowa Code section 17A.4(1)"b," an oral presentation may be requested of the Board on its own motion after reviewing the statements may determine that an oral presentation should be scheduled.

These amendments are intended to implement Iowa Code sections 17A.4, 22.7(3), 22.7(6), 476.1, and 476.2.

The following amendments are proposed.

Item 1. Add a new paragraph 1.9(5)"c."

**1.9(5)"c" Materials exempted pursuant to requests deemed granted by board rule.**  
Requests that material or information be withheld from public inspection that contain negotiated transportation rates and prices for natural gas supply included in purchased gas adjustment filings, and negotiated purchase prices for electric power, fuel and transportation in support of energy assistance clause filings, or the financial records filed by applicants for certificates of convenience and necessity to provide local exchange service shall be deemed granted pursuant to Iowa Code section 22.7(3) as a trade secret or pursuant to Iowa Code section 22.7(6), as a report to a



government agency which, if released, would benefit competitors and would serve no public purpose, or pursuant to both sections, provided that the confidential portions of the filings are identified and segregated and an attorney for the company or a corporate officer avers that those portions satisfy Iowa Code sections 22.7(3) or (6), or both, as interpreted by the Iowa Supreme Court. The information shall be held confidential by the board upon filing and will be subject to the provisions of 199 IAC 1.9(8)"b"(3).

Item 2. Amend subparagraph 1.9(8)"b"(3) as follows:

**1.9(8)"b"(3)** In the case of requests to inspect records not routinely available for public inspection under 1.9(5)"a"(1), ~~and 1.9(5)"a"(3), and 1.9(5)"c,"~~ the board will notify all interested parties of the request to view the materials. The board will withhold the materials from public inspection for 14 days to allow the party who submitted the materials an opportunity to seek injunctive relief. If injunctive relief is not requested within this period, the records will be produced for inspection.

Requests to review materials not routinely available for public inspection under any other category of paragraph 1.9(5)"a" ~~or 1.9(5)"c"~~, will be acted upon by the board.

If the request is granted by the board, or is partially granted and partially denied, the person who submitted the records to the board will be afforded 14 days

from the date of the written ruling in which to seek injunctive relief. If injunctive relief is not requested within this period, the records will be produced for inspection.

December 11, 2001

/s/ Diane Munns

Diane Munns  
Chairman